Supreme Court, U.S.
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No. 88-1131

In The

Supreme Court of the United States

October Term, 1988

HARBOR INSURANCE COMPANY,

Petitioner,

v.

TRAMMELL CROW, et al.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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25 pp

QUESTION PRESENTED

The question presented is whether the problem addressed in *Budinich v. Becton Dickinson & Co.*, ___ U.S. ___, 108 S.Ct. 1717 (1988), should even arise when the district court chooses to enter a judgment that is titled "Interlocutory Judgment" and clearly states, in ordering language, that it is an "Interlocutory Judgment only."

LIST OF PARTIES AND RULE 28.1 LIST

The list of the parties set out in the Petition for Writ of Certiorari ("Petition") is correct.

There is another action pending in Texas State Court that arises from the matters at issue here. The parties to that action have an interest in the outcome of this case. The parties to that action are The Chasewood Construction Company; Trammell Crow; Alexander & Alexander of Texas, Inc.; United States Fire Insurance Company; Floyd West & Company; Crum and Forster; Groce, Locke & Hebdon; and Jones, Day, Reavis & Pogue.

Respondent The Chasewood Construction Company is owned by the following individuals: Charles Holbrook, Trammell S. Crow, Robert V. Gass, James Engel, D. Michael Crow, and Dennis H. Albert.

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No. 88-1131

In The

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October Term, 1988

HARBOR INSURANCE COMPANY,

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v.

TRAMMELL CROW, et al.,

Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Trammell Crow and The Chasewood Construction Company respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's judgment in this case. The Fifth Circuit's opinion is reported at 854 F.2d 94 (1988).

STATEMENT OF THE CASE

The statement of facts in the opinion below is correct and is incorporated herein by reference. Petitioner

Harbor Insurance Company ("Harbor" or "petitioner") was plaintiff in the district court in a suit against respondents Trammell Crow and The Chasewood Construction Company. Harbor sought a declaratory judgment that it was not liable under an insurance policy it had issued to respondents. On September 14, 1987, the district court filed a memorandum order stating that petitioner's motion for summary judgment would be granted. (R. 652-64; Petition pp. A-16-28). In that memorandum order, the district court also ordered that "Harbor shall submit a proposed form of judgment consistent with this memorandum order." (R. 664; Petition p. A-28).

On September 29, 1987, Harbor's counsel wrote to the district court, informing the court of the parties' inability to decide on attorney's fees. (R. 669; p. A-1, *infra*). Harbor's counsel drafted and attached two forms of proposed judgment to his letter. The first was a final judgment in case the district court preferred "to wait until all issues have been resolved before entering any type of judgment . . . " (R. 670; p. A-2, *infra*). The second proposed judgment was styled "Interlocutory Judgment." (p. A-3 *infra*). In the first paragraph, Harbor's proposed interlocutory judgment stated that the district court was of the opinion that "an Interlocutory Judgment should be entered . . . " *Id.* In its final paragraph the interlocutory judgment ordered that "this Judgment is an Interlocutory Judgment only . . . " (p. A-4, *infra*).

On September 30, 1987, the district court chose to sign the interlocutory judgment Harbor's counsel had submitted. (R. 672-73; Petition pp. A-29-30). On October 21, 1987, a United States Magistrate – to whom the parties had agreed to submit all remaining issues in the case –

rendered judgment on the entire case including the attorney's fees. (R. 710-11; Petition pp. A-31-32). Respondents filed their notice of appeal November 19, 1987. (R. 712-13).

In its brief in the Court of Appeals, Harbor did not raise the issue of timeliness of the notice of appeal. Nor did Harbor assert at that time that the interlocutory judgment its counsel had proposed was actually a final judgment. Not until oral argument before the Court of Appeals did Harbor argue for the first time that the September 30, 1987, interlocutory judgment was actually a final judgment. The Court of Appeals held that the October 21, 1987, judgment was the final judgment and that the September 30, 1987, interlocutory judgment was only an interlocutory judgment. The Court of Appeals reversed the district court on the merits and remanded the case to the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

Harbor bases its petition for writ of certiorari primarily on this Court's opinion in *Budinich v. Becton Dickinson & Co.*, ___ U.S. ___, 108 S. Ct. 1717 (1988). In that case, this Court considered the question "whether a decision on the merits is a 'final decision' as a matter of federal law under [28 U.S.C.] § 1291 when the recoverability or amount of attorney's fees for the litigation remains to be determined." *Id.* at 1720. Voicing a concern about the "operational consistency and predictability" in the application of 28 U.S.C. § 1291, this Court ruled that federal law, rather than state law, controls this issue, and that

under federal law "an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." *Id.* at 1721-22.

In this case, the September 30, 1987, interlocutory judgment – which states twice in the text that it is interlocutory in addition to being labelled as interlocutory – was rendered "pending a resolution of Harbor's claim for attorney's fees . . . " (R. 672-73; Petition pp. A-29-30). Harbor claims that this interlocutory judgment was a final judgment, despite its express language to the contrary, because of this Court's decision in *Budinich*. The Fifth Circuit held that the September 30, 1987, interlocutory judgment was truly interlocutory. It stated, "[w]e find nothing in the Supreme Court's writing to remove the district court's control of the case and transform its interlocutory order into a final judgment when the latter court chooses to render its final judgment after resolving the attorney's fee issue." 854 F.2d at 97.

I. THE SUPPOSED CONFLICT BETWEEN THE CIRCUITS IS NOT A VALID AND CURRENT CONFLICT AND THE GRANTING OF A WRIT WOULD BE PREMATURE.

The determinant of whether this Court should grant the petition for writ of certiorari is whether "there are special and important reasons" for granting the writ. Sup. Ct. R. 17.1. To cause the question in this case to appear "special and important," Harbor claims that a conflict exists between the circuits concerning the issue whether a judgment – denominated as interlocutory – will be regarded as interlocutory or final. An examination of the supposedly conflicting courts of appeals' decisions

shows, first, that they are all at least thirty years old. *See* Petition pp. 9-11. All of the cited decisions predate this Court's decision in *Budinich*. All of the cited decisions predate the separate document requirement for final judgments that the 1963 amendments added to Fed. R. Civ. P. 58. In fact, some of the cited decisions predate the Federal Rules of Civil Procedure. *See The Attualita*, 238 F. 909 (4th Cir. 1916); *Mercantile Trust Co. v. Chicago P. & St. L. Railway Co.*, 123 F. 389 (7th Cir. 1903); *Potter v. Beal*, 50 F. 860 (1st Cir. 1892).

Only one of Harbor's authorities even presents an issue similar to the question that Harbor desires the Court to review here.[1] *See Delta Drilling Co. v. Arnett*, 186 F.2d 481 (6th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951). The judgment in *Delta Drilling* was labeled "Interlocutory Order and Judgment;" but unlike the judgment at issue here, the judgment in *Delta Drilling* did not state within its ordering provisions the district court's intent that it was an "Interlocutory Judgment only."

In deciding *Delta Drilling*, the Sixth Circuit could not have considered this Court's important post-1950 decisions regarding the finality of judgments. *E.g., Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978); *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227 (1958). Of course, *Delta Drilling* does not construe or apply this

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[1] Two of petitioner's authorities are cases in which a court of appeals decided that a decree stated to be interlocutory, or interlocutory in form, actually was interlocutory. *Bennell Realty Co. v. E. G. Shinner & Co.*, 74 F.2d 491, 493-94 (7th Cir. 1935); *Mercantile Trust Co. v. Chicago, P. & St. L. Railway Co.*, 123 F. 389, 393 (7th Cir. 1903).

Court's recent decision in *Budinich*. Furthermore, *Delta Drilling* has not been cited by the Sixth Circuit on the issue of a judgment's finality since 1953. *See Durkin v. Mason & Dixon Lines, Inc.*, 202 F.2d 425 (6th Cir. 1953). Nor has any other circuit ever relied upon *Delta Drilling* as support for the proposition that a judgment, titled interlocutory, is actually final.

Under these circumstances, it is impossible to know whether the Sixth Circuit would consider *Delta Drilling* still to be binding authority. It certainly has not relied on that case for any of Harbor's cited propositions in the last thirty five years. If this Court were to grant Harbor's petition for writ of certiorari, it would be doing so on nothing more than an assumption that a conflict exists. However, this Court has previously stated that " 'it is very important that we be consistent in not granting the writ of certiorari except in cases . . . where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' " *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

The question that Harbor poses to this Court is whether "the Court of Appeals properly created an exception to *Budinich* based on the district court's use of the label 'Interlocutory Judgment' . . . " (Petition p.i). As of this time, there has only been one court decision evaluating the impact of *Budinich* on a judgment that the district court expressly stated was interlocutory only. That decision is this case. No conflict has arisen between the courts of appeals on this issue. Consequently, it

would be premature to grant a petition for writ of certiorari at this juncture. As this Court has written, it "should not risk inconclusive and divisive disposition of a case when time may further illumine or completely outmode the issues in dispute." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 77 (1955); *accord, McCray v. New York*, 461 U.S. 961, 962-63 (1983) (Stevens, J.) (denying certiorari where there presently was no conflict of decision in the federal system because "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date").

Finally, it is obvious from the Petition that the issue raised rarely arises. It is apparent that Harbor has researched federal and state law from the present to nearly one hundred years ago. (Petition pp. 9-11). In all of that time, Harbor was able to produce only one case that even arguably conflicted with the Fifth Circuit's decision in this case. *See Delta Drilling Co. v. Arnett*, 186 F.2d 481 (6th Cir. 1950), *cert. denied*, 340 U.S. 954 (1951). Obviously, the question presented is not a pressing issue. This Court has previously stressed the need to avoid rendering decisions in cases of "isolated significance." *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 76 (1955). This Court does not "sit for the benefit of the particular litigants," nor does it decide cases that are merely "academic" or "episodic." *Id.* at 74. The issue in this case has not assumed a status anywhere near the level of public importance necessary to warrant this Court's time and attention. This Court should deny the petition for writ of certiorari.

II. THE FIFTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH *BUDINICH* AND WAS A CORRECT DECISION.

The judgment at issue in *Budinich* did not state that it was interlocutory. It simply rendered judgment on the merits and did not address the question of attorney's fees, which was resolved in subsequent motions and hearings. In *Budinich,* this Court was called upon to decide whether a judgment was final when finality *vel non* was not apparent from the face of the judgment. Because the judgment in this case was expressly stated by the district court to be interlocutory, it significantly differs from the judgment at issue in *Budinich*. The decision below does not conflict with *Budinich*.

Moreover, the Fifth Circuit's decision in this case was correct. In *Budinich* this Court formulated a bright line rule out of concerns for "predictability in the overall application of [28 U.S.C.] § 1291." *Budinich v. Becton Dickinson & Co.*, ___ U.S. ___, 108 S.Ct. 1717, 1721 (1988). Practical considerations have always governed the question whether a judgment is final. "[T]his Court has held that the requirement of finality is to be given a 'practical rather than a technical construction.' " *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964) (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). It was because of those practical considerations that the separate document requirement was added to Fed. R. Civ. P. 58. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384 (1978) ("The sole purpose of the separate document requirement . . . was to clarify when the time for appeal under 28

U.S.C. § 2107 begins to run"). Considerations of practicality also led this Court to rule that the separate document requirement could be waived. *Id.* at 387. As this Court has emphasized:

> "[I]t must be remembered that the rule [requiring that a judgment be set out in a separate document] is designed to simplify and make certain the matter of appealability. It is not designed as a trap for the inexperienced.
>
> . . . The rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss."

Id. at 386 (quoting 9 J. Moore & B. Ward, Moore's Federal Practice ¶110.08[2], p. 119-20). Along these same lines, this Court has stated that "it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).

The rule Harbor seeks to impose would ignore the practical considerations that have long governed this Court's rulings on the finality of judgments.[2] It is one thing to devise a bright line test that a judgment is final despite a pending determination of attorney's fees when the judgment does not state whether or not it is final. But

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[2] Interestingly, Harbor relies on this Court's opinion in *United States v. Indrelunas*, 411 U.S. 216, 222 (1973) as support for the proposition that this Court's rulings regarding the finality of judgments must be mechanically applied. With regard to that specific statement, this Court later "disavow[ed] it" to the extent that it was inconsistent with the more pragmatic approach outlined in *Bankers Trust Co. v. Mallis*, 435 U.S. 384, 386 n.7 (1978).

to rule that a judgment that states three times that it is interlocutory is actually a final judgment is not a practical result. Parties attempting to determine whether a judgment is final could not read the simple, clear statement of the district court's intent and have any idea whether or not to believe it. Every judgment would have to be analyzed to determine which of the district court's words can be believed and which must be ignored. This kind of procedure leads back to the very same kind of "trap for the inexperienced" that this Court has warned against in the past. *See Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978).

It is apparent that, despite the many rules used to construe the finality of a judgment, the district judge's intent remains an important consideration. *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 n.6 (1978) ("Even if a separate judgment is filed, the court of appeals must still determine whether the district court intended the judgment to represent the final decision in the case"). In this case, two proposed judgments – one final and one interlocutory – were presented to the district court and it chose to enter the one that was interlocutory. The district court stated its intent, three times in the judgment, that the judgment was interlocutory. The parties similarly understood the judgment to be interlocutory and treated it as such. It was not until the oral argument in the court of appeals that Harbor advanced the theory for the first time that the interlocutory judgment was actually a final judgment. *See United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 235-36 (1958) (looking to the parties' and the district court's actions to help determine whether a judgment was final).

Finally, the potential for abuse in Harbor's requested rule is obvious. As in this case, district courts sometimes request the prevailing party to draft a proposed judgment. Harbor's rule would give that party the power to draft a judgment that says it is interlocutory, that looks interlocutory, and that opposing parties and the district court believe is interlocutory. But, under Harbor's proposed rule, that judgment could be final – a trump card the prevailing party could then play against the unwary in the appellate process. This result is neither pragmatic nor equitable.

The Fifth Circuit's ruling in this case adheres to the concerns for practicality that this Court has emphasized so many times in the past. It is a correct ruling that this Court should not reconsider on certiorari.

CONCLUSION

For the reasons stated herein, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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September 29, 1987

HAND DELIVERED

The Honorable A. Joe Fish
U. S. District Judge
Federal Building 15A7
1100 Commerce Street
Dallas, Texas 75242

Re: No. CA 3-84-0166-G
Harbor Insurance Company vs. Trammell Crow
and The Chasewood Construction Company

Dear Judge Fish:

Tim Kelley, counsel for defendants, has been unsuccessful in obtaining any authority from his clients with respect to the issues relating to Harbor's claim for attorney's fees and is unsure as to exactly when he will be able to discuss this claim with them. Accordingly, rather than request an additional extension of the deadline for filing a proposed Judgment herein, I am enclosing two

proposed Judgments, one an Interlocutory Judgment and the other a Final Judgment.

If the Court wants to enter a Judgment pending resolution of Harbor's claim for attorney's fees, I believe the enclosed Interlocutory Judgment will satisfactorily serve this purpose. On the other hand, if the Court prefers to wait until all issues have been resolved before entering any type of Judgment, I believe the enclosed proposed Final Judgment will serve that purpose once Harbor's claim for attorney's fees has been resolved.

In connection with Harbor's claim for attorney's fees, neither plaintiff nor defendants object to having same heard by a Magistrate. Accordingly, I will appreciate your having one of your staff or one of the Magistrates schedule an evidentiary hearing on the issue of attorney's fees and advise us of the date and time for same.

Your attention to this matter is greatly appreciated.

Respectfully yours,

ORIGINAL SIGNED BY
JAMES H. MOODY, III

HM:fl

Encls.

cc: Mr. Timothy E. Kelley
Attorney at Law
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Dallas, Texas 75240-6305
(w/encls.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARBOR INSURANCE COMPANY, Plaintiff, VS. TRAMMELL CROW and THE CHASEWOOD CONSTRUCTION COMPANY, Defendants.	§	CIVIL ACTION NO. CA 3-84-0166-G

INTERLOCUTORY JUDGMENT

By Memorandum Order dated September 14, 1987, this Court granted the Motion for Summary Judgment of Plaintiff, Harbor Insurance Company, and the Court being of the opinion that an Interlocutory Judgment should be entered pending a resolution of Harbor's claim for attorney's fees against Defendants Trammell Crow (mistakenly identified as Trammel Crow Co. Inc., in the style of this case) and The Chasewood Construction Company, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that neither of the Defendants is entitled to recover of or from Harbor Insurance Company the face amount, or any part thereof, of the Harbor Umbrella Liability Policy bearing Policy No. HI153214, issued by Plaintiff to Defendants on or about May 13, 1981; and that Plaintiff is not obligated under said policy of insurance to pay the Judgment, or any part thereof, entered in Cause No. 82CI-07486 by the 150th Judicial District Court of Bexar County, Texas, in

favor of David R. Rico and Rico Construction Company against Chasewood Construction Company; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants, Trammell Crow and The Chasewood Construction Company, do have and recover nothing of and from Harbor Insurance Company; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that this Judgment is an Interlocutory Judgment only and shall have no effect whatsoever on Harbor's claim for attorney's fees, which claim shall be heard at the time and in the manner required by future Orders of this Court.

SIGNED this ___ day of _____, 1987.

_____

UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

HARBOR INSURANCE COMPANY, Plaintiff, VS. TRAMMELL CROW and THE CHASEWOOD CONSTRUCTION COMPANY, Defendants.	§ § § § § § § § § § §	CIVIL ACTION NO. CA 3-84-0166-G

FINAL JUDGMENT

By Memorandum Order dated September 14, 1987, this Court granted the Motion for Summary Judgment of Plaintiff, Harbor Insurance Company, and the Court being of the opinion that said Memorandum Order is dispositive on all issues in this case, including the counterclaim filed by Defendants Trammell Crow (mistakenly identified as Trammel Crow Co., Inc., in the style of this case) and The Chasewood Construction Company, it is, accordingly,

ORDERED, ADJUDGED AND DECREED that neither of the Defendants is entitled to recover of or from Harbor Insurance Company the face amount, or any part thereof, of the Harbor Umbrella Liability Policy bearing Policy No. HI153214, issued by Plaintiff to Defendants on or about May 13, 1981; and that Plaintiff is not obligated under said policy of insurance to pay the Judgment, or any part thereof, entered in Cause No. 82CI-07486 by the 150th Judicial District Court of Bexar County, Texas, in

favor of David R. Rico and Rico Construction Company against Chasewood Construction Company; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff do have and recover of and from Defendants, Trammell Crow and The Chasewood Construction Company, jointly and severally, reasonable attorney's fees in the sum of $___, plus interest thereon at the rate of ___ per cent per annum from the date of this Judgment until paid.

All costs of court expended or incurred in this cause are hereby adjudged against Defendants, Trammell Crow and The Chasewood Construction Company, jointly and severally. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary. All other relief not expressly granted herein is denied.

SIGNED this ___ day of _____, 1987.

_____
UNITED STATES
DISTRICT JUDGE